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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 230

EDWIN CHARLES BEAUCHAMP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 145–151) is reported at 154 F. 2d 413.

JURISDICTION

The judgment of the circuit court of appeals was entered April 1, 1946 (R. 145), and a petition for rehearing was overruled May 27, 1946 (R. 165). The petition for a writ of certiorari was filed June 24, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45

(a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether petitioner could be prosecuted under Section 42 of the Criminal Code for aiding a deserter from the Army before the soldier had been convicted of desertion by a court-martial.

STATUTE INVOLVED

Section 42 of the Criminal Code (18 U. S. C. 94) provides in pertinent part that:

> * * * whoever shall harbor, conceal, protect, or assist any such soldier, seaman, or other person who may have deserted from such service, knowing him to have deserted therefrom, or shall refuse to give up and deliver such soldier, seaman, or other person on the demand of any officer authorized to receive him, shall be imprisoned not more than three years and fined not more than $2,000.

STATEMENT

An indictment containing a single count was returned against petitioner in the United States District Court for the Eastern District of Michigan on June 5, 1944, charging that he aided and assisted one Alexander White, a soldier in the military service of the United States who had deserted from the service, in continuing his desertion and avoiding apprehension by proper authorities (R. 1–2). Petitioner waived a trial

by jury (R. 3), and after a trial by the court was found guilty (R. 3–4) and sentenced to imprisonment for a period of 20 months and to pay a fine of $1,000 (R. 4–5). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the conviction was affirmed (R. 145).

The evidence showed that White, who was absent without leave from the Army, had been arrested by the military police in Detroit, and while going back to his camp, had once more absented himself and returned to his home (R. 12). This was in October 1943 (R. 12). White did not intend to return to the Army (R. 15, 114, 117). A few weeks later petitioner, who had employed White prior to his entering service, reemployed him in his auto parts business at Pontiac, Michigan (R. 13–14). Petitioner knew that White had been in the Army (R. 10, 90). The evidence of several witnesses showed that petitioner was fully aware that White was a deserter from the Army and was wanted by the military authorities for desertion (R. 13–14, 35, 42–43). There was evidence that petitioner had taken advantage of that circumstance to get more work out of White by threatening to turn him in to the Army if he did not improve his working habits (R. 13, 40, 43, 45, 116). Police on several occasions visited petitioner's place of business, making inquiries about White; on these visits they had informed petitioner that White was a deserter (R. 51–52, 55, 56–67). On one of these visits.

petitioner had identified White as being a person named Cassidy (R. 35, 57, 59, 60, 61), and told the police that White had not been there (R. 52, 53, 54, 55).

ARGUMENT

Petitioner contends that since desertion is a military offense, only a military tribunal could adjudicate that issue, and that until such a military adjudication had been made as to White, the district court was without jurisdiction to try petitioner for aiding him (Pet. 4–5, 9–12).

Petitioner's contention is supported neither by the terms of Section 42 of the Criminal Code for violation of which he was convicted, nor by the purpose of that section, nor by established principles of criminal law. That portion of the statute under which petitioner was indicted only requires the Government to show that (1) the defendant aided or harbored the soldier, (2) the soldier was a deserter, and (3) the defendant knew that the soldier had deserted. The record unequivocally establishes all three of these factors. There is no requirement in the statute, either express or implied, that as a condition precedent to prosecution the fact of desertion must be established by the adjudication of a proper military tribunal. To read such a condition into the statute would require civil courts to abdicate their independent functions of determining legal and factual issues for themselves, and would, moreover, introduce uncertainty into civil judicial

administration by making the enforcement of the Criminal Code contingent upon the administration of the Articles of War and the Articles for the Government of the Navy.

1. The language of Section 42 here pertinent, "whoever shall * * * assist any such soldier * * * who may have deserted from such service, knowing him to have deserted therefrom", negatives the notion that the deserter must first have been convicted of desertion by a court-martial of competent jurisdiction. The statute reads, "who may have deserted from such service," not—as petitioner seems to urge—"who may have been convicted of desertion from such service." Both as a matter of language and of congressional intent, it seems clear that the statute refers to one who has absented himself from the service without authority and without intent to return, rather than to one who has actually been convicted of desertion. The evil which Congress sought to remedy was the sheltering &c. by civilians of servicemen who had left military control and who were evading attempts to return them to such control to answer for their offenses. Construed as petitioner urges, the statute would be self-defeating: the military authorities could not possibly adjudicate the issue of desertion before the apprehension of the soldier, yet the offense under Section 42 of aiding or harboring a deserter necessarily occurs before the deserter's apprehension. The action which that section makes criminal is the very

action which, if persisted in undisturbed, would preclude the possibility of ever obtaining a military adjudication.

Indeed, as the legislative history of Section 42 shows, aiding or harboring a deserter was made an offense precisely because such acts did prevent the apprehension of persons who had deserted and who were avoiding adjudication by court-martial. The present provision, which is derived from two sections of the Revised Statutes,[1] actually originated as Section 24 of the Civil War draft act of March 3, 1863, c. 75, 12 Stat. 731, 735, at which time the language now material read,

> That every person not subject to the rules and articles of war * * * who shall harbor, conceal, or give employment to a deserter, * * * knowing him to be such * * *

That provision was designed not only to effect the purposes of the Civil War draft, but also to strike at the then prevalent "absenteeism" which had materially and dangerously reduced the effective strength of the Union Army. See, *e. g.*, Cong. Globe, 37th Cong., 3d sess., p. 1253. Both purposes would have been frustrated by a reading which would restrict "deserter" to mean one who

[1] R. S. 1553 and R. S. 5455. The basic legislation was Sec. 24 of the Act of Mar. 3, 1863, noted in the text, and the Act of July 1, 1864, c. 204, 13 Stat. 343, enacting similar substantive provisions in respect of aiding or entering deserters from the naval service.

had been duly convicted of desertion by sentence of court-martial.

An apposite analogy may be found in the legislation authorizing civil officers to arrest deserters. After this Court had held in *Kurtz* v. *Moffitt*, 115 U. S. 487, that civil officers—in that case, two San Francisco policemen—had no power as such to arrest deserters, Congress authorized "any civil officer having authority under the laws of the United States or of any State, Territory, or District, to arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the General Government." Section 2 of the Act of October 1, 1890, c. 1259, 26 Stat. 648.[2] Such authority in virtually identical language is presently contained in the 106th Article of War, 10 U. S. C. 1578.[3] To say that this authorizes the arrest of a deserter for purposes of turning him over to the military authorities only after the deserter has been duly convicted by the military authorities is to place the cart before the horse with a vengeance and to make the statute a nullity. Yet that is in substance petitioner's argument here as to Section 42 of the Criminal Code.

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[2] See also Section 3 of the Act of June 16, 1890, c. 426, 26 Stat. 157, 158, containing a similar authorization.

[3] There are added, after "District", the words "possession of the United States."

To require a prior military adjudication that the soldier was a deserter would bring great uncertainty to civil administration of this statute designed to discourage the civilian population from aiding or harboring deserters from the armed forces. For many reasons, the military adjudication might be interminably delayed or even made impossible, as, for example, by the inability of the military authorities to apprehend the deserter, or by his death. Such delays might, in many cases, bar civil prosecution, because the statute of limitations had run,[4] or might make prosecution difficult, if not impossible, because the evidence had become stale or beyond the reach of the prosecuting authorities. It is apparent, therefore, that not only is there no reason in law or policy to read into the statute any such condition as urged by petitioner, but that efficient enforcement of the policy of the statute requires that it be unhampered by such a condition.

2. Petitioner argues that because the statute here involved is related to a military offense—desertion—and because, under our system, military and civil law are kept distinct, it is not within the competence of a civil court to determine whether the military offense of desertion has in fact been committed (Pet. 10–11). But this argument, as petitioner's citations show (*Ex*

[4] There is no military statute of limitations on desertion in time of war. AW 39, 10 U. S. C. 1510.

parte Quirin, 317 U. S. 1; *In re Yamashita,* Nos. 61 Misc. and 672, Oct. Term, 1945; *Duncan* v. *Kahanamoku,* Nos. 14 and 15, Oct Term 1945; *Kurtz* v. *Moffitt, supra*), confuses the line between civil and military jurisdiction as to persons with the power of civil courts to make incidental determinations of military questions. The civil courts frequently litigate issues of a purely military character, including determinations as to whether military offenses have been committed, either in violation of statutory codes (*e. g., Carter* v. *McClaughry,* 183 U. S. 365; *McRae* v. *Henkes,* 273 Fed. 108 (C. C. A. 8), certiorari denied, 258 U. S. 624; *In re Cadwallader,* 127 Fed. 881 (C. C. E. D. Mo.); *Hanson* v. *South Scituate,* 115 Mass. 336) or in violation of the unwritten laws of war (*Ex parte Quirin,* 317 U. S. 1; *In re Yamashita,* Nos. 61 Misc, and 672, Oct. Term, 1945).

There is no mystery about desertion, even though it lacks statutory definition. *Cf.* AW 58, 10 U. S. C. 1530. "A deserter is one who absents himself from his * * * military station or duty, and from the service, without authority, and with the intention of not returning." 2 Winthrop, *Military Law and Precedents* (2d ed. 1896) * 985; see also *Manual for Courts-Martial* (1928) 142;[5] 15 Op. Att'y Gen. 158; *Hanson* v. *South Scituate,*

[5] The 28th Article of War, 10 U. S. C. 1499, which makes absence without leave "with the intent to avoid hazardous duty or to shirk important service" likewise desertion, is not here involved.

115 Mass. 336, 338. Here White had overstayed his time; he started back for his home station in October 1943 but instead went to work for petitioner (R. 12) until he was apprehended four months later (R. 15); and he had no intention of returning to the Army (R. 15, 114, 117). Even in the absence of his own explicit admissions of intention, the circumstance that he wore civilian clothes (*e. g.*, R. 13, 19, 23, 31, 39, 40, 125) would be almost conclusive of his intent not to return to the service. *Manual for Courts-Martial* (1928) 144. Indeed, in close cases the fact that the accused when apprehended was still in uniform is strong evidence of intent not to desert. Dig. Op. JAG 1912–1940, par. 416 (8), subpars. (1), (2), (4); par. 416 (9), subpars. (3), (8), (9), (10).

3. The problem of proving the prior military conviction of the deserter which petitioner says must precede his own civil conviction presents an additional reason demonstrating the unsoundness of his contention. The military conviction cannot be proved simply by introducing into evidence the court-martial order reciting the fact and result of the trial; to do this would violate petitioner's right of confrontation under the Sixth Amendment. *Kirby* v. *United States,* 174 U. S. 47. In that case, Kirby was charged with receiving postage stamps which had been stolen, under a statute which provided that the judgment that the principal felon has been convicted shall be conclusive evidence in the prosecution against the receiver that the property has been stolen.

Such judgment was duly introduced, and Kirby was convicted. This Court reversed the conviction, holding the statutory provision unconstitutional in the face of the Sixth Amendment; it pointed out that proof that the stamps had been stolen must be supplied by witnesses, the same as any other element of the crime. Under that decision, the proof of White's desertion offered in the instant case was clearly the only competent evidence of such desertion which could be received. Petitioner in effect asks that his own trial be postponed in order to await the inadmissible testimony of White's military conviction.

4. The same result follows under generally accepted rules of criminal law regarding parties to crime. If the offense for which petitioner was tried is construed as being in effect that of an accessory after the fact, it is unnecessary as a condition thereof that the principal offender, the deserter, be convicted or even arrested. Compare, *e. g., Kaufman* v. *United States,* 212 Fed. 613 (C. C. A. 2); *Neal* v. *United States,* 102 F. 2d 643 (C. C. A. 8); *United States* v. *Venturini,* 1 F. Supp. 213 (S. D. Ala.); *Chapman* v. *United States,* 3 F. Supp. 903 (S. D. Ala); *State* v. *Jones,* 91 Ark. 5. But—and more properly—considering the act denounced by Section 42 as a distinct offense, the circumstance that petitioner's guilt is contingent upon proof that another crime has been committed does not require that someone else must have been convicted for that other crime. The most apt analogy is the crime of receiving

stolen property. To establish that offense it must, of course, be shown that the property charged to have been received was in fact stolen. But the guilt of the receiver is as a principal in an independent crime and is not derivative or dependent on the guilt of the thief. 1 Bishop, *Criminal Law* (9th ed.) § 700; cf. 2 Wharton, *Criminal Law* (12th ed.) § 1229. Similarly, under federal criminal statutes such as the National Motor Vehicle Theft Act (18 U. S. C. 408) and the National Stolen Property Act (18 U. S. C. 415), offenders have been tried and convicted in countless cases without regard, and properly so, to whether the thief has been apprehended or tried for his independent offense. Cf. *Kirby* v. *United States, supra.*

5. Finally, petitioner urges (Pet. 4):

> The result of such construction requires a member of the military services to be adjudicated guilty of the crime of desertion by a civilian tribunal without anticipatory punishment. It may occasion any civilian seeking to aid a returned soldier to commit a crime of which he was unaware. It conceivably could be applied to any member of the family of a member of the armed forces who without intent, urged and condoned his failure to return to camp on time. Likewise, does it possibly preclude the long recognized distinction between the crimes of Absent Without Leave as contrasted to desertion.

It is a sufficient answer that the statute expressly requires that to establish the offense it must be shown that the person charged with aiding or harboring knows the soldier to be a deserter, and that the evidence in this case unequivocally established petitioner's knowledge that White was a deserter and petitioner's efforts to prevent White's apprehension as such (pp. 3–4, *supra*). Indeed, as White testified, petitioner threatened "to turn me in to the Sheriff in Pontiac, for being a deserter from the Army" (R. 14). And, with White's intent to desert established by his own testimony and admissions (R. 15, 114, 117), there could be no possible danger of confusing absence without leave and desertion.

CONCLUSION

The decision below is clearly correct; there is no conflict; and the question is not one which requires further review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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